Public Prosecutor v Mohd Fazil bin Awaludin

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3)45–23 OF 2007
MOHD ZAWAWI JC
7 JANUARY 2009

Criminal Procedure — Prosecution — Conduct of — Failure to comply with s 51A of the Criminal Procedure Code — Whether would statutorily bar prosecution from tendering documents not delivered to accused before trial in course of trial — Whether trial would be rendered a nullity — Criminal Procedure Code s 51A

The accused was charged with two offences of trafficking in dangerous drugs in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the prosecution's case, the accused raised the issue that the prosecution had failed to comply with s 51A of the Criminal Procedure Code ('CPC'). Section 51A of the CPC governs disclosure in criminal procedure by requiring the prosecution to reveal information and disclose documents before the commencement of the trial. Although the prosecution admitted that it had failed to comply with s 51A of the CPC, it argued that the documents were disclosed and delivered to the defence forthwith in the course of the trial after the defence reminded the prosecution that the documents had not been provided. The prosecution submitted therefore that the late disclosure was due to an unintentional oversight and it did not cause any prejudice to the defence. The accused on the other hand submitted that the non-compliance with s 51A of the CPC had caused a miscarriage of justice in that the accused's right to a fair trial had been substantially compromised. The accused therefore alleged that he had suffered prejudice in that he had been seriously disadvantaged in the preparation and conduct of his case and that without the information supplied he was not aware of the strengths and weaknesses of the prosecution's case. This judgment therefore concerned the interpretation of s 51A of the CPC on which there were no decided decisions in Malaysia.

Held, non-compliance of s 51A did not make the trial a nullity:

(1) As far as s 51A of the CPC is concerned, the consequence of the non-compliance would not make the trial a nullity. There is a distinction between provisions which prescribe the manner of trial and

provisions which provide for the conduct of the trial. Although disregard of a provision under the former is fatal to the trial and at once invalidates the conviction, disregard of the latter, even though prescribed in a mandatory manner is not fatal unless the court is satisfied that the accused was prejudiced. The provisions of s 51A of the CPC are poles apart from ss 399 and 402A of the CPC, which are not only procedural but also evidential. The non-compliance of s 51A of the CPC would not statutorily bar the prosecution from tendering the documents which were not delivered to the accused before trial as evidence in the course of the trial. Therefore, s 51A is only procedural and not evidential (see para 19).

(2) The scope of s 51A of the CPC is rather limited. The general object of Legislature in enacting s 51A of the CPC was to advance the overall fairness, justice, efficiency and the truth finding elements of criminal proceedings. However, the overriding object of Legislature in enacting s 51A of the CPC was to deal with cases efficiently and expeditiously by ensuring that there was a fair system of disclosure without delays. This purposive approach is consistent with the provisions of s 17A of the Interpretation Acts 1948 and 1967 (see para 19).

(3) The word 'shall' in sub-s (1) of s 51A of the CPC means the provision is directory and not mandatory. Thus if the requirement of s 51A of the CPC had not been timely complied with by the prosecution, there was no impediment for the court to adjourn proceedings to enable the accused to inspect the documents referred to in s 51A of the CPC (see para 19).

(4) After scrutinising the entire record of proceedings in this case it was found that the failure of the prosecution to comply timely with s 51A of the CPC did not impair the right of the accused to make full answer and defence of his case. Neither was there any evidence that the prosecution had withheld or suppressed evidence including the evidence which was favorable to the accused. Therefore the accused's right to a fair trial had not been compromised or the failure of the prosecution to comply with s 51A did not have an adverse effect on the accused in his preparation of a defence to the charge preferred against him (see paras 20–23).

[Bahasa Malaysia summary

Tertuduh dituduh dengan dua kesalahan mengedar dadah berbahaya bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, tertuduh membangkitkan isu bahawa pihak pendakwaan telah gagal untuk mematuhi s 51A Kanun Prosedur Jenayah ('KPJ'). Seksyen 51A KPJ mengawal pendedahan dalam prosedur jenayah

dengan memerlukan pendakwaan untuk mendedahkan maklumat dan dokumen-dokumen sebelum permulaan perbicaraan. Walaupun pihak pendakwaan mengaku bahawa ia telah gagal untuk mematuhi s 51A KPJ, ia berhujah bahawa dokumen-dokumen tersebut telah dikemukakan dan diserahkan kepada pihak pembelaan dengan sepatutnya semasa perbicaraan berlangsung selepas pihak pembelaan mengingatkan pihak pendakwaan bahawa dokumen-dokumen tersebut tidak lagi disediakan. Pihak pendakwaan oleh itu berhujah bahawa kelewatan pengemukaan itu adalah kesilapan yang tidak disengajakan dan ia tidak mengakibatkan sebarang prasangka kepada pihak pendakwaan. Tertuduh sebaliknya berhujah bahawa ketidakpatuhan dengan s 51A KPJ telah menyebabkan salah laku keadilan di mana hak tertuduh untuk perbicaraan adil telah terjejas. Tertuduh oleh itu mendakwa dia telah mengalami prasangka di mana dia mengalami kekurangan yang serius dalam penyediaan dan tindakan kesnya dan tanpa maklumat yang disediakan dia tidak sedar akan kekuatan dan kelemahan kes pendakwaan. Penghakiman ini oleh itu menitikberatkan penafsiran s 51A KPJ di mana tidak terdapat kes seumpamanya yang telah diputuskan di Malaysia.

Diputuskan, ketidakpatuhan terhadap s 51A tidak menyebabkan perbicaraan tidak sah:

(1) Setakat yang diperuntukkan olehs 51A KPJ, akibat dari ketidakpatuhan tidak menyebabkan perbicaraan tidak sah. Terdapat perbezaan di antara peruntukan yang menetapkan cara perbicaraan dan peruntukan yang memperuntukkan tentang pengendalian perbicaraan. Walaupun ketidakpatuhan kepada peruntukan terdahulu adalah mudarat kepada perbicaraan dan serta merta membatalkan sabitan, ketidakpatuhan terhadap peruntukan berikutnya, walaupun dinyatakan di dalam cara yang mandatori tidak memudaratkan kecuali mahkamah berpuashati bahawa tertuduh telah mendapat prasangka. Peruntukan s 51A KPJ adalah jauh berbeza dengan ss 399 dan 402A KPJ, yang bukan hanya bersifat perkara prosedur tetapi juga bersifat keterangan. Ketidakpatuhan s 51A KPJ tidak secara statutori menyekat pihak pendakwaan dari menyerahkan dokumen-dokumen yang tidak diserahkan kepada tertuduh sebelum perbicaraan sebagai keterangan sepanjang perjalanan perbicaraan. Oleh itu, s 51A hanya bersifat prosedural dan bukan keterangan (lihat perenggan 19).

(2) Skop s 51A KPJ adalah agak terhad. Objektif umum badan perundangan dalam menggubal s 51A KPJ untuk meletak kehadapan keadilan menyeluruh, kebenaran dan kecekapan dan elemen penemuan kebenaran dalam prosiding jenayah. Walau bagaimanapun, objektif utama badan perundangan dalam penggubalan s 51A KPJ adalah untuk

berurusan dengan kes-kes secara cekap dan pantas dengan memastikan bahawa terdapat satu sistem pengemukaan yang adil tanpa kelewatan. Pendekatan ini adalah bersesuaian dengan peruntukan s 17A Akta Tafsiran 1948 dan 1967 (lihat perenggan 19).

(3) Perkataan 'akan' dalam sub-s (1) s 51A KPJ bermaksud peruntukan bersifat arahan dan bukan mandatori. Oleh itu jika keperluan s 51A KPJ tidak dipatuhi mengikut masa oleh pendakwaan, tidak wajib untuk mahkamah menunda prosiding-prosiding tersebut untuk membenarkan tertuduh memeriksa dokumen-dokumen yang dirujuk dalam s 51A KPJ (lihat perenggan 19).

(4) Setelah meneliti keseluruhan rekod prosiding di dalam kes ini didapati bahawa kegagalan pihak pendakwaan untuk mematuhi mengikut masa dengan s 51A KPJ tidak menjejaskan hak tertuduh untuk membuat jawapan penuh dan pembelaan di dalam kesnya. Juga tidak terdapat mana-mana keterangan bahawa pihak pendakwaan telah menahan atau menyekat keterangan termasuk keterangan yang berpihak kepada tertuduh. Oleh itu hak tertuduh untuk perbicaraan yang adil tidak terjejas atau kegagalan pihak pendakwaan untuk mematuhi s 51A tidak membawa kesan buruk kepada tertuduh dalam penyediaannya untuk pembelaan terhadap pertuduhan ke atasnya (lihat perenggan 20–23).]

Notes

For a case on conduct of prosecution, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2924.

Cases referred to

Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334; [2004] 6 AMR 810, CA (refd)
Bradly v Maryland (1963) 373 US 83, SC (refd)
Cheah Yoke Thong v PP [1984] 1 MLJ 311 (refd)
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11; [2002] 2 CLJ 57, FC (refd)
Howard v Bodington (1877) 2 PD 203 (refd)
Jarrod Rags v Magistrate's Court of Victoria [2008] VSC 1, SC (refd)
Karuma v The Queen [1955] AC 197, PC (refd)
Liverpool Borough Bank v Turner (1860) 30 LJ Ch 379 (refd)
Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 691; [1993] 4 CLJ 211, SC (refd)
Petty v The Queen (1991) 173 CLR 95, HC (refd)
Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155, FC (refd)
PP v Choo Chuan Wang [1992] 3 CLJ (Rep) 329 (refd)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 63, HC (refd)
R v Brown [1997] 3 All ER 769, HL (refd)
R v Keane [1994] 1 WLR 746, CA (refd)

A *R v Sang* [1979] 2 All ER 1222, HL (refd)
R v Stinchcome [1991] 3 SCR 326, SC (refd)
R v Ward [1993] 1 WLR 619, CA (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513, FC (refd)
Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393,
B FC (refd)
United Hokkien Cemeteries, Penang v The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121; [1979] 1 LNS 122, FC (refd)

Legislation referred to
C Criminal Procedure Code ss 51, 51A, 51A(b), (c), 51A(2), 399, 399(2), 402A
Criminal Procedure and Investigation Act 1996 s 3(1)
Dangerous Drugs Act 1952 s 39B(1)(a), (2)
Evidence Act 1950 s 114(g)
D Interpretation Acts 1948 and 1967 s 17A

Husmin Hussin (Deputy Public Prosecutor, State Adviser's Office) for the prosecution.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the accused.

E **Mohd Zawawi JC:**

[1] This judgment concerns the interpretation of s 51A of the Criminal
F Procedure Code ('CPC').

[2] To better understand the issue, regard must be had to the background of the case. I will now narrate it briefly.

G **[3]** The accused was charged with two offences of trafficking in dangerous drugs in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. The accused claimed trial to the charge. The prosecution called six witnesses to support its case. In the course of his argument at the end of the prosecution's case, learned
H counsel raised a point about the effect of non-compliance of s 51A of the CPC by the prosecution.

[4] In the instant case, it is not disputed that the prosecution has failed to comply with s 51A of the CPC, in particular, there was no compliance of
I s 51A(b) and (c) of the CPC. With regard to s 51A(c), which relates to favourable facts to the defence of the accused, the prosecution is not invoking s 51A(2) of the CPC that disclosure would be contrary to public interest. To his credit, learned counsel does not impute any 'discreditable conduct' on the part of the learned deputy for the violation of the section. In his submission,

the learned deputy candidly admitted that the documents ought to have been, but were not, disclosed before the commencement of the trial. He submits, however, the late disclosure was due to an unintentional oversight and it did not cause any prejudice to the defence. In support of this submission, the learned deputy argues that the documents were disclosed and delivered to the defence forthwith in the course of the trial after the defence reminded him that the documents had not been provided. The learned deputy informs the court that as far as s 51A(c) of the CPC is concerned, there are no facts favourable to the defence of the accused which should be disclosed under the said subsection. Therefore, he argues there has not been any impediment to the conduct of the defence such that the defence has not been able to present its case adequately by virtue of the late disclosure.

[5] Learned counsel has argued a number of points before me about the effect of non-compliance of s 51A of the CPC by the prosecution. I do not think I do him injustice if I summarise his argument in a single sentence. He says that by reason of the non- compliance, there is a miscarriage of justice in that the accused's right to a fair trial has been substantially compromised. The point being made by learned counsel is that by reason of the non-compliance, the defence suffers the following:

(a) prejudice in that the accused has been seriously disadvantaged in the preparation and conduct of its case; and

(b) that without the information being supplied, the accused does not know the strengths and weaknesses of the prosecution's case. In effect, there is a breach of 'the equality of arms' principle.

[6] Now, the terms of s 51A of the CPC are as follows:

> 51A Delivery of certain documents
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> (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:
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> (a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;
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> (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and
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> (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.
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> (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

A [7] Section 51A of the CPC is a newly inserted provision that came into being by virtue of Amendment Act A1274/06 to govern what is known in criminal procedure as 'disclosure' requiring the prosecution to reveal information and disclose documents. Prior to 2006, the general right to disclosure of documents was governed by s 51 of the CPC, which empowers B the court to issue a summons or an order to produce the property or document that is necessary or desirable for a trial. The discretion under s 51 of the CPC may be exercised before the commencement of a trial or during the course of a trial. The section remains in force.

C [8] It is well settled law that the prosecution has a duty to ensure the prosecution's case is present properly with fairness to the accused. It is often stated the prosecution's duty is not to obtain a conviction at all means, but simply to lay before the court the whole fact which is relevant to the case. In *R v Stinchcome* [1991] 3 SCR 326, for example, Sopinka J stated that:

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> the fruits of investigation which are in the possession of counsel for the crown are not property of the crown for use in securing a conviction but the property of the public to ensure that justice is done.

E [9] The principle of a fair trial is sacrosanct in all civilised legal jurisdictions. It is a principle of universal application. In Malaysia the principle of fair trial and fairness have been long-established and recognised in several decisions. Some of these include *Cheah Yoke Thong v Public Prosecutor* [1984] 1 MLJ 311 and *Azahan bin Mohd Aminallah v Public* F *Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810.

[10] Learned counsel submitted that the CPC is silent on effect of the non-compliance of s 51A of the CPC. This provision is new and as such there G are no decided decisions in Malaysia of this particular issue. Therefore, learned counsel invites the court to look at the approach undertaken in other jurisdictions. A good starting point would be the common law approach taken by the courts in the UK and Australia.

H [11] In support of his argument, learned counsel drew the court attention to two authorities. To do justice to learned counsel, I shall refer to these two cases. In the leading case of *R v Brown* [1997] 3 All ER 769, Lord Hope Craighead said:

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> The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. *If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context, as Lord Taylor of Gosforth CJ observed in Reg v Keane* [1994] 1 WLR 746*, at p 750G, the great principle is that of open justice. It would be contrary to that*

principle for the prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence. These are the rules upon which ss 3 and 7 of the Criminal Procedure and Investigations Act 1996 have been based. But they had already found their expression in decisions by the courts. It is necessary to mention only a few of them in order to identify the extent of the duty of disclosure, and to trace its development, as background to the issue which arises in this case.

In *Dallison v Caffery* [1965] 1 QB 348, at p 369 Lord Denning MR described the duty of the prosecution in these terms:

> The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings (for committal before the magistrates), gave the solicitor for the defence the statement of Mr and Mrs Stamp; and thereby he did his duty.

In the same case, at p 375G, adopting the words of Lord Goddard CJ in *Rex v Bryant and Dickson* (1946) 31 Cr App R 146, Diplock LJ observed that the proposition that it is the duty of the prosecution to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person, was erroneous. It is clear, then, that in his view the principle of open justice did not extend that far. As he put it:

> A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is consistent with the guilt of the accused, or, although not inconsistent with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence.

(Emphasis added.)

[12] In *Jarrod Rags v Magistrate's Court of Victoria* [2008] VSC 1 the Supreme Court of Victoria discussed the principle of 'equality of arms' in the following manner:

> [45] The criminal trial is 'an accusatory and adversarial process'. n18. The person accused is presumed to be innocent and does not have to prove or say anything. The prosecution is the accuser and, from the first to the last, carries the onus of proving each element of the offence according to the criminal standard beyond reasonable doubt. The rationale is that the general objectives of the criminal justice system — finding the truth and attributing criminal responsibility — are best achieve by a trial conducted before an independent and impartial judge, or judge and jury, in which both sides participate according to their best interests. A number of important rules of law and practice apply to regulate and moderate

A the adversarial nature of such a trial, but it has the appearance, and often the reality, of a ritual battle. *Equality of arms is an international human rights principle that picks up the language of the battle to explain some aspects of the most important of those rules — the right to a fair trial.*

B [46] This is the equality of arms principle, which applies to both civil and criminal trials, n19 as stated by the European Court of Human Rights in *Foucher v France:*

> The court reiterates … *that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case on conditions that do not place him at a*
C *disadvantaged vis-à-vis his opponent. n20.*

[47] Here is the more elaborate statement of the principle given by Stefania Negri in the International Criminal Law Review, which also emphasises it is one of comprehensive application:

D > *The right to a fair trial entails protecting the 'equality of arms' principle, an inherent element of the due process of law in both civil and criminal proceedings. Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality. Indeed, at the core of the concept of 'equality*
E *of arms', as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial.* Fundamental procedural safe-guards aimed at securing such equality are guaranteed in most domestic legal orders, enshrined in human rights treaties and other relevant international instruments, and set out in the statutes and rules of the major
F international courts and tribunals. n21.

[48] The equality of arms principle — which was probably taken from the civil law tradition n22 ... was originally stated by the European Court of Human Rights set up under the European Convention on Human Rights. The European Convention
G — to use its abbreviated name ... was entered into in 1950 in the aftermath of the Second World War. Articles 6(1) and (3) contain provisions relating to equal right to a fair trial before an independent and impartial court or tribunal that are of fundamental importance. The provisions came from the common law and civil legal traditions of those civilised countries that respected and followed the principle
H of a fair trial and the rules necessary to produce one.

(Emphasis added.)

[13] And on the prosecutor's duty to promote fairness the court said:

I > *[69] The principles of the courts establish that the general duty of a prosecutor is to prosecute and not to defend, but the prosecution 'must be conducted with fairness towards the accused... and with a single view to determining and establishing the truth.'* n51 Therefore prosecutors should see themselves as 'minister of justice'. n52 Their duty is 'assist the court in the attainment of the purpose of criminal prosecutions,

namely, to make certain that justice is done as between the subject and the state'. *n53 In performing that function, the prosecutor must act with the objective 'of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one'*; n54 As was said in *Cannon v Tahche* n55 — *the 'duty' is owed to the court and not to the public at large or the accused. It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial.*

[14] And the court proceeded to give two instances of the prosecution's duty to act fairly:

[70] One specific manifestation of the prosecutor's duty to act fairly towards the accused is the duty to call all material witnesses, whether their evidence will be in favour of the prosecution or the defence, unless there is good reason not to. n56 The duty must be exercised with fairness to the accused. n57 It has been described as a 'lonely' and 'heavy' responsibility that cannot be shared with the trial judge without jeopardising their judicial independence in the adversary system. n58 The exercise of this duty is seen to fall within the prosecutor's discretion. n59 It cannot be judicially reviewed, but may be a ground for setting aside a conviction on appeal if, when viewed against the conduct of the trial as a whole, it gave rise to a miscarriage of justice. n60.

[71] Another specific manifestation of the prosecutor's duty to act fairly towards the accused n61 is the duty to disclose material documents to the defence. n62 The duty is an incident of the accused's right to a fair trial. n63 It is a continuous duty in the sense that it applies not only in the pre-trial period but also during the course of the trial itself. n64.

[72] The scope of this prosecution's duty to disclose is broad but has limits.

[73] As to the scope of the duty, it clearly extends to material on which the prosecution intends to rely for its own case, n65 including the substance of all statements of a prosecution witness or the statements themselves. n66 *The duty also extends to material in the possession of the prosecution that may undermine the prosecution case n67 or which tends to assist the defence case n68 to material which tends to show the accused is innocent, n69 which is inconsistent with the guilt of the accused or which, if not inconsistent, is helpful to the accused, n70 to material going to 'exculpate n71 the accused, to the criminal history or other material affecting the credit of prosecution witnesses n72 to statements of material witness who the prosecution does not intend to call, n73 and to documents, photographs and other real evidence, including scientific analysis*. n74 The duty does not require the disclosure of material that might undermine the defence case, such as matters affecting the credibility of defence witnesses, the defence is responsible for making its own inquiries in this regard'.

(Emphasis added.)

[15] From my own research, it revealed that in English law before 1996, disclosure was governed by common law rules, and by 1994 the position

which had been reached was that the duty was held to be one to disclose all material matters which affected the cases relied on by the prosecution, whether they would strengthen or weaken the prosecution case or assist the defence case (*R v Ward* [1993] 1 WLR 619, *R v Keane* [1994] 1 WLR 746). The rule was modified by the Criminal Procedure and Investigation Act 1996 ('the CPIA'), which provided for what is described, in the side-notes, as primary and secondary disclosure. Primary disclosure was required under s 3(1) which provides:

> The prosecutor must:
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> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused, or (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

Secondary disclosure was required under s 7(2) which provided:

> The prosecutor must:
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> (a) disclose to the accused any prosecution material which has not previously been disclosed and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

The defence statement referred to is a written statement setting out in general terms the nature of the accused's defence, indicating the matters on which he takes issue with the prosecution and the reasons why he takes issue.

Section 3(1)(a) was amended by the Criminal Justice Act 2003 and as amended requires that the prosecutor must:

> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

At the same time s 7 was repealed.

These provisions were commented on in *R v H and C* [2004] UKHL 3, at para 35:

> If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations

> and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court.

[16] In Australia, there are differences between the jurisdictions, as explained in the NSW Law Commission Report 2000. In NSW 'At common law the prosecution is required to disclose its intention to call a witness at trial who was not called at committal and to give the defence a copy of the relevant witness statement. The prosecution is not generally required to provide the defence with copies of statements of persons whom the prosecution does not intend to call as witnesses (even if the statements could provide the defence with relevant evidence) although it is considered good practice to do so. A decision by the prosecution not to call a particular person as a witness can constitute a ground for setting aside a conviction if it gives rise to a miscarriage of justice' (*Petty v The Queen* (1991) 173 CLR 95 at p 108). However barristers' and solicitors rules and DPP guidelines do require disclosure of all material which 'might be relevant to the guilt or innocence of the defendant, including the names and means of locating potential witnesses'.

[17] While due accord should be extended to learned counsel who has demonstrated a great deal of industry in preparing the submission, I am of the considered view that one must be guarded when making reference to English and Australian authorities on the subject of disclosure because there are differences between the provisions in the UK, Australia and Malaysia.

[18] It ought also to be remembered that the courts should not import common law from other countries where legislation in Malaysia has clearly provided for it. In *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, Abdul Hamid Mohamad FCJ (as he then was) said at p 536:

> In my view, this court is bound by the provisions of our own rules and not that of any other country ...
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> Furthermore, this court too should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms part of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s 3(1) of the Civil Law Act 1956, must be borne in mind.

[19] What are the consequences of a failure to disclose material documents before the commencement of the trial? As far as s 51A of the CPC is

concerned, I do not think that the consequence of the non-compliance would make the trial a nullity. My reasons are as follows:

19.1 Firstly, there is a distinction between provisions which prescribe the manner of trial and provisions which provide for the conduct of the trial. Disregard of a provision under the former is fatal to the trial and at once invalidates the conviction. However, disregard of the latter, even though prescribed in a mandatory manner is not fatal unless the court is satisfied that the accused has been prejudiced. In my opinion, provisions relating to the delivery of certain documents to the accused before trial like s 51A of the CPC concerns with the conduct of the trial. A comparison of s 399, 402A and s 51A of the CPC will illustrate the point. Subsection (2) of s 399 of the CPC sets a precondition, in that, where the public prosecutor intends to give any evidence of the report of a person listed under sub-s (2), he has to deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial. If the public prosecutor did not comply with the precondition stipulated, the report is not admissible in evidence. Therefore, the service of notice to the accused is not only procedural but it is evidential. So too s 402A of the CPC. This section was enacted to prevent any person from fabricating evidence of alibi and to enable the police to interrogate the intended witness or witnesses well before the date of trial to ascertain the validity of the defence. The non-compliance with the requirements of s 402A will render evidence in support of an alibi inadmissible.

19.2 The provisions of s 51A of the CPC are poles apart from those sections. The non-compliance with s 51A of the CPC would not statutorily prevent the prosecution from tendering the documents which were not delivered to the accused person before trial as evidence in the course of the trial. Therefore, it is only procedural and not evidential. It has long been held as a matter of law that even in respect of evidence obtained illegally, it remains admissible. As was stated by Lord Goddard in the Privy Council case of *Karuma v The Queen* [1955] AC 197:

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

19.3 The House of Lords decision in *R v Sang* [1979] 2 All ER 1222 is frequently quoted by our courts as high authority for the rejection of the court's discretion to reject illegally obtained evidence on public policy grounds. Lord Diplock said:

> It is part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there

> will be a remedy in civil law: if it was obtained illegally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with it not how the evidence sought to be adduced by the prosecution has been obtained, but how it is used by the prosecution at the trial.

19.4 Secondly, unlike in the UK, the scope of s 51A of the CPC is rather limited. Granted, as I have said earlier in this judgment, the general object of legislature in enacting s 51A of the CPC is to advance the overall fairness, justice, efficiency and the truth finding elements of criminal proceedings. And under the section also the prosecution owes a general duty to deliver certain documents which may assist the accused in his defence. The documents concerned must include not only that which the prosecution intends to tender as part of the evidence (sub-s (1)(b)) but also which it does not, ie facts which is favourable to the accused (sub-s (1)(c)). However, it would appear that the overriding object of legislature in enacting s 51A of the CPC is to deal with cases efficiently and expeditiously. The section is designed to ensure that there is a fair system for the disclosure, especially of unused material which may assist the defence in the timely preparation and presentation of its case and enables the court to focus on all the important issues in the trial so that the trial will not be halted or delayed.

19.5 There are occasions where counsels are unable to get copy of the charge, first information report, witnesses statements, the cautioned statement made by the accused, medical reports, chemist reports, forensic reports, photographs, investigation notes until very late, usually on the eve of hearing. This of course means that counsels spend considerable court time examining prosecution witnesses on point that may be unnecessary if they had access early to the said documents. In a state of inadequate knowledge, counsels steps merrily and this perforce leads to a much slower progress in the trial. In *Public Prosecutor v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 63, Mohd Azmi J (as he then was) said apropos of this problem:

> It is true that in the present case the five documents referred to in the charge would be produced by the prosecution at the trial in order to prove their case, and as and when they are tendered in evidence, the accused can always apply for a reasonable adjournments to enable their counsels to study them. But for practical purposes, such adjournments could and should be avoided by furnishing to the accused before trial.

19.6 The right to trial without undue delay was affirmed in the case of *Public Prosecutor v Choo Chuan Wang* [1992] 3 CLJ (Rep) 329 where the court had read in a guarantee of the 'right to a fair hearing within a reasonable time by an impartial court established by law' as part of the right to life and personal liberty in art 5(1) of the Federal Constitution. The court recognised that 'the general proposition that criminal work should be disposed of with the least possible delay in order to avoid hardship to the accused who may be in custody or who in any case has the right to have the criminal accusation against him determined as soon as possible', cannot be disputed.

19.7 My view above is fortified by the speech made by the then minister in the prime minister's department, YB Dato' Seri Radhi bin Sheikh Ahmad when he tabled the relevant bill in Parliament. He said:

> [Seksyen] 51A ini satu peruntukan baru di mana buat pertama kali dalam sejarah kita, kita memperkenalkan satu prosedur yang seolah-olah prosedur dalam mahkamah perbicaraan kes-kes sivil. Di mana dalam peraturan ini kita menghendaki pihak pendakwa mengemukakan beberapa kenyataan, beberapa keterangan yang menyebelahi pihak yang kena tuduh sebelum perbicaraan itu bermula.
>
> *Tujuan kita buat demikian ialah untuk memendekkan perbicaraan dengan cara itu. Kedua, dengan cara itu, pihak pembela tidak akan membuat permohonan kepada mahkamah untuk menangguhkan kes-kes kerana kononnya dokumen ini belum dapat diterima lagi, dia hendakkan dokumen ini dan sketch plan dan seterusnya daripada pihak pendakwa. Dengan cara itu kita memendekkan perbicaraan.* Walau bagaimanapun dimasukkan satu proviso. Jawatankuasa telah sengaja mengadakan pengecualian bagi perenggan c di mana pegawai-pegawai pendakwa tidaklah membekalkan fakta-fakta yang menguntungkan terhadap tertuduh atas alasan ia akan menjejaskan kepentingan awam ataupun *public interest*.
>
> (Emphasis added.)

19.8 The 'purposive approach' adopted above is consistent with the provision of s 17A of the Interpretation Acts 1948 and 1967 (Act 388) and the same was adopted by the Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; [2002] 2 CLJ 57 and *United Hokkien Cemeteries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121; [1979] 1 LNS 122.

19.9 Thirdly, provision of s 51A of the CPC is not mandatory but only directory. How does the court distinguish between mandatory and

directory duties? The answer is given by Lord Campbell in *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379:

> No universal rule can be laid down … It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

In *Howard v Bodington* (1877) 2 PD 203 at p 211, which was followed by the Federal Court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155, Lord Penzance stated:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that respect decide whether the enactment is what called imperative or only directory.

19.10 NS Bindra's *Interpretation of Statutes* (8th Ed) had this to say in regard to the word 'shall', at pp 1029–1030:

> The word 'shall' in its ordinary signification is mandatory though there may be considerations which influence the court in holding that the intention of the Legislature was to give a discretion. But this word is not necessarily mandatory, nor always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the Legislature which is ascertained by carefully attending to the whole scope of the statute to be construed:
>
> The use of the word 'shall' would not by itself make a provision of the Act mandatory. It is to be construed with reference to the context in which it is used. Similarly, mere use of the word 'shall' or the absence of it, does not decide the question whether a provision is directory or mandatory.
>
> When a statute uses the word 'shall' prima facie, it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial

A consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

19.11 Therefore, the task of the court is to bear steadily in mind that it is the real intention of the legislature that must be ascertained. It was held in B *Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 3 MLJ 691 at p 693; [1993] 4 CLJ 211 at p 213:

> The courts have always construed these words with reference to the context in which it is used. In order to find out whether these words C are being used in directory or mandatory sense, the intent of the legislature should be looked into, along with the pertinent circumstances.

19.12 Having regard to the provision of s 51A of the CPC and particularly the overriding object of the section as I have alluded before, it is my D considered opinion that the word 'shall' in sub-s (1) of s 51A of the CPC means directory. If the requirement of s 51A of the CPC has not been timely complied with by the prosecution, I think there is no impediment for the court to adjourn proceedings to enable counsel to inspect documents referred to in s 51A of the CPC. In other words, in E applying and administering s 51A of the CPC, the court should keep in mind not only to the technical non-compliance of the section but also to the justice of the particular case. Therefore, the court still has powers and discretion to grant adjournment to enable counsel to inspect the documents.

F

[20] Now, reverting back to the main contention of learned counsel in this instant case that by reason of the non-compliance by the prosecution of s 51A of the CPC, there is a miscarriage of justice in that the accused's right to a fair trial has been substantially compromised. The court has scrutinised the entire G record of proceedings of this case and found that the failure of the prosecution to comply timely with s 51A of the CPC does not prejudice the right of the accused to make full answer and defence of his case. In the course of the trial, learned counsel was delivered and handed with the following documents:

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(i) photographs of the exhibits (exh P8A–exh P8M);

(ii) photographs of the scene of the crime (exh P9A–exh P9C);

(iii) a certified copy of 'Pendaftaran Barang-Barang Kes' (exh P4); I

(iv) search list (exh P24);

(v) 'sijil serah-menyerah' (exh P25);

(vi) chemist report (exh P37);

(vii) sketch plan and key (exhs P10 and P10K);

(viii) chemist's note (exh P38); and

(ix) newspaper cutting (exh P39).

[21] No adjournment was sought by learned counsel to enable him to inspect and scrutinise the documents concerned. Learned counsel also did not seek to recall any of the prosecution's witnesses nor has requested more time to prepare for cross-examination. In any event, record of proceedings showed that only a few questions was asked by learned counsel regarding the matters contained in these documents. As regards sub-s (1)(c) of s 51A of the CPC, there was no suggestion whatsoever by learned counsel that any exculpatory and material evidences which is favourable to the defence of the accused was withheld by the prosecution. Moreover, it is material to note that learned counsel had not alleged any specific prejudice to the accused. Learned counsel did not suggest to the prosecution witnesses or in the course of his submission that the following materials were withheld or suppressed:

(a) evidence which may point to the conclusion that no crime has been committed or that no crime was committed on the date or at place mentioned in the charge;

(b) evidence which may contradict (real or oral) on which the prosecution's case will rely;

(c) information which may cast doubt on the credibility or reliability of the prosecution's witnesses;

(d) information which may be inconsistent with scientific or other experts on which the prosecution will rely or with inferences which may be drawn from such evidence;

(e) evidence or information which may point to another person or persons; and

(f) evidence or information which might reduce the degree of the seriousness of the offence.

[22] Learned counsel also did not invite the court to invoke s 114(g) of the Evidence Act 1950. The reason is very obvious. Based on the evidence adduced, the court could not conclude that the prosecution had withheld or suppressed the evidence including the evidence which is favourable to the defence of the accused. It should be borne in mind, provided that there is no oblique motive, the prosecution has a discretion whether or not to produce certain evidence or to call a particular witness and also has a discretion specifically not to call a witness in whom it does not believe to be a witness

of truth. Of course, the prosecution's right to produce certain evidence or to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof.

[23] In the instant case, after considering all the evidence that has been adduced by the prosecution, the court has no doubt whatsoever that the accused's right to fair trial has not been compromised or the failure by the prosecution to comply with s 51A of the CPC had an adverse effect on the accused to prepare full answer and defence to the charge preferred against him. Learned counsel also has failed to establish that such failure could affect the reliability of the trial result and fairness of the trial process. There was no material before the court to enable it to conclude that there is a reasonable possibility that the lines of cross-examination or the lines of inquiry with witnesses could have been different if the documents concerned were made available or had been disclosed to the defence.

[24] Perhaps it is not out of place in this context to quote the decision of Abdul Hamid Mohamad FCJ (as he then was) in *Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393, where he said (at p 408):

> It is true that the courts, through its decisions try to arrive at a 'fair and just result'. But, it can only do so within the confine of the law, not through some general and vague sense of fairness and justice.

[25] The general proposition that there is a general duty upon the prosecution to deliver to the accused certain relevant material which might assist him in his defence before trial cannot be disputed. On the other hand, the interests of justice do not mean the interest of the accused only for we have to consider interests of society at large in finding out wrongdoers and repressing crime and especially so in the case of a capital charge. The task of the court must therefore to balance these interests. In balancing these interests the court must, take into account the practice and procedure of the courts, the right of the accused for asserting his rights, the prejudice to the accused (if any) and generally, the particular circumstances of the case concerned.

[26] Before departing from the present case, perhaps it would be appropriate for me to make this observation. By delivering certain documents as stipulated in s 51A of the CPC to the accused before trial, it would go a long way to ensure that the accused has the opportunity to present all relevant information at trial regarding his guilt or appropriate punishment, reinforcing a core principle of the administration of criminal justice, that is, fair trial. Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent, as well as to convict the guilty, to guard the rights of the accused, as well as to

enforce the right of the public. In this regard, the US court in *Bradly v Maryland* (1963) 373 US 83, at pp 87–88 had this to say:

> Society wins not when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly ... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts in the role of an architect of a proceeding that does not comport with standards of justice ...

[27] As regards the role of counsel, the court considers that counsel's diligence in pursuing disclosure by the prosecution pursuant to s 51A of the CPC is relevant because lack of due diligence is significant factor in determining whether the non-disclosure affected the fairness of the trial process. Counsel who had, or ought to have become, aware of the failure on the part of the prosecution to timely disclosure must not remain passive, but diligently pursue the matter by sending a reminder to the prosecution regarding its obligation under the said section.

Non-compliance of s 51A did not make the trial a nullity.

Reported by K Nesan